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Table of Contents

1. Introduction

Social media allow us to engage with unlimited audiences. What was previously the prerogative of publishers, companies and "geeks", is now at everyone's fingertips.[1] Sadly, the power of social media isn't always used for good. The specific characteristics of these environments, such as the invisibility of audiences or false feelings of anonymity, lower the threshold for the sharing of harmful content.[2] Breaches of confidence, defamation and cyberbullying are but a few examples of social networking gone wrong. If the harm is sufficiently severe, the injured party will want to obtain remedy.

Generally speaking, there are mainly two avenues for seeking remedy. First, the injured party can try turning to the originator of the content. In principle, every user of an Online Social Network (OSN) can be held responsible for the content he or she decides to share.[3] Secondly, the injured party can try to turn to the OSN provider. While the provider may not be at the origin of the harmful content, it nevertheless assists in its dissemination. Addressing the OSN provider might be particularly attractive in cases where the originator of the content is unresponsive, difficult to identify, or resides in a foreign jurisdiction.

The purpose of this deliverable is to analyse the liability and accountability of actors involved in OSNs. To keep the analysis concise, we have chosen to limit the scope of our study in several respects. First, our study is limited to liability and accountability in relation to privacy harms (e.g., reputational damage, loss of confidentiality). Second, our study focuses on two groups of actors in particular, namely OSN providers and OSN users.

The remainder of this deliverable is structured as follows. First, an analysis will be made of the liability of OSN users. Specifically, an analysis will be made of legal constructs offering remedy for privacy harms, including (1) the right of personal portrayal (2) tort law, (3) defamation and libel and (4) data protection law. Next, we will analyse the liability exposure of OSN providers, taking into account the potential for liability exemption. Finally, we will describe the main redress mechanisms available to injured parties.

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[1] See also IDATE, TNO, IViR, *User-Created-Content: Supporting a participative Information Society*, SMART 2007/2008, p. 261 et seq., accessible at http://www.ivir.nl/publicaties/download/233, last accessed 24 December 2014.

[2] G. Somers & L. Nauwelaerts, "Onrechtmatige handelingen op sociale netwerken: wie is nu eigenlijk aansprakelijk?" in P. Valcke, P.J. Valgaeren & E. Lievens (eds.), *Sociale media – Actuele juridische aspecten*, Antwerpen, Intersentia, 2013, p. 102.

[3] *Ibid*, p. 94.

2. Liability of OSN users

In principle, every OSN user can be held liable for damages resulting from his or her misconduct. "Misconduct", in the legal sense, can take on various forms. First, there is behaviour which violates a legal norm (e.g., a provision of the criminal code). Second, there is behaviour which is considered "wrongful" for failing to satisfy the general standard of care. Finally, there is behaviour which violates a contractual obligation. The following sections will explore privacy harms for which an OSN user may be held liable. After first discussing the main grounds for extra-contractual liability, a brief analysis shall be made of the contractual liability of OSN users.

2.1 Extra-contractual liability

a. Right of personal portrayal

People have the right to control the use of their image. In principle, anyone seeking to record or use the image of another person must first obtain that person's consent.[4] In legal terms, this is referred to as the "right of personal portrayal" or "portrait right".[5] The term "portrait" should be understood broadly, as any reproduction of the image or likeness of a person, regardless of the technique or carrier used.[6]

The right of personal portrayal is infringed as soon as the image of a person is used without his or her permission. Taking a picture of someone and posting it online without

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[4] D. Voorhoof and P. Valcke, *Handboek Mediarecht*, Larcier, 4e editie, 2014 p. 239-240.

[5] The right of personal portrayal belongs to the category of personality rights protecting the physical, psychological and moral characteristics of a person as well as the related external expression See E. Guldix and A. Wylleman, "De positie en handhaving van persoonlijkheidsrechten in het Belgische privaatrecht", *T.P.R.* 1999, 1594. In Belgium, the right of personal portrayal was originally developed through case law. On an international level, the right is protected by several human rights instruments, such as the European Convention of Human Rights (article 8) and the International Covenant of Civil and Political Rights (article 16).[5] A violation of the right of personal portrayal gives rise to extra-contractual liability (article 1382 of the Belgian Civil Code, 'BCC')[5], but several courts have also recognised an autonomous liability ground in article 10 of the Belgian Copyright Act.[5] (P. De Hert and R. Saelens, "Recht op afbeelding", *TPR* 2009, afl. 2, 869.) The right of personal portrayal has also been dealt by the European Court of Human Rights in its Article 8 case law. For instance in *von Hannover v. Germany*, the Court ruled that "*the right to the protection of one's image is thus one of the essential components of personal development. It mainly presupposes the individual's right to control the use of that image, including the right to refuse publication thereof* …" See *von Hannover v. Germany (no. 2)*, Grand Chamber judgment of 7 February 2012, § 96. In *Reklos and Davourlis v. Greece*, the Court stressed the importance of the consent requirement: "*As a person's image is one of the characteristics attached to his or her personality, its effective protection presupposes, in principle and in circumstances such as those of the present case, obtaining the consent of the person concerned at the time the picture is taken and not simply if and when it is published*." See *Reklos and Davourlis v. Greece*, § 40, ECtHR First Section judgement on 11 December 2008.

[6] Based on P. De Hert and R. Saelens, "Recht op afbeelding", *TPR* 2009, afl. 2, 867. The "likeness" of a person includes all external characteristics or the behaviour of a person, such as a special way of dressing, the general attitude of a person, his posture or even a memory of his habits, see L. Dierickx, "Recht op afbeelding" in X., *Reeks 'Instituut voor Familierecht en Jeugdrecht KU Leuven*, nr. 89, Antwerpen, Intersentia, 2005, 62. For an interesting example see Brussels 20 September 2001, *AM* 2002, 77.

their consent, for example, would constitute a clear infringement of the right to personal portrayal.[7] The only requirement to invoke the right of personal portrayal is that the individual is sufficiently identifiable, i.e. can be recognised by others.[8]

To be valid, the consent of the individual concerned must be specific and well-defined.[9] For example, permission to take a picture does not by itself imply permission to upload it to an OSN.[10] Likewise, permission to upload a picture to an OSN does not constitute permission to upload it to a different type of website.[11]

Consent may be given orally, in writing, or can be implicit.[12] For example, a person who poses before a camera is generally considered to provide implicit consent for the taking of his or her picture.[13] Certain courts also accept that appearance in a public place signifies

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[7] Posting the picture online without consent could be qualified as a "reproduction" without consent, and thus an infringement of the right to personal portrayal. See generally L. Dierickx, "Recht op afbeelding", Antwerpen, Intersentia, 2005, 23-24; P. De Hert and R. Saelens, "Recht op afbeelding", *TPR* 2009, afl. 2, 876.

[8] See e.g. Court of Appeal of Antwerp, 26 March 2007, *Nieuw Juridisch Weekblad* 2007, afl. 170, 801, Voorz. Rb. Brussel 22 oktober 2009, AM 2010, afl. 3, 301. See also D. Voorhoof , "Facebook en de Raad voor de Journalistiek", *Nieuw Juridisch Weekblad* 2011, afl. 235, p. 39.

[9] E. Brewaeys, "Recht op afbeelding", *NJW* 2010, afl. 218, 206.

[10] Capturing and use of one's image are in principle two distinct processes which require separate consent. See Commissie voor de Bescherming van De Persoonlijke Levenssfeer, *Aanbeveling nr. 02/2007 van 28 november 2007 inzake de verspreiding van beeldmateriaal*, p. 4, accessible at http://www.privacycommission.be/sites/privacycommission/files/documents/aanbeveling_02_2007_0.pdf (last accessed 26 November 2014).

[11] In principle, any further use of an OSN picture outside the OSN context - which hasn't been previously been authorised by the individual concerned - will also constitute a violation of the person's right to personal portrayal. Posting a picture on a publicly accessible profile of an OSN may reasonably be construed as implicit consent towards third parties to access the photo and perhaps even store a local copy. It may even signify implicit consent towards indexation by search engines. However, it cannot by itself be construed as signifying a blanket consent for use in a different context. See also Gent, 13 January 2000, *Auteurs & Media* 2000, afl. 3, p. 326.See however also Voorz. Rb. Brussel 22 October 2009, *Auteurs & Media* 2010, afl. 3, 301 (where it was held that "*a person who agrees that several pictures of her made publicly available on a website implicitly consents to the use of the photographs published in other publications provided the pictures remain in a similar context*").

[12] In case of minors, it is in principle the parent or legal guardian who must in principle consent on the minor's behalf, unless the minor has reached the "age of discernment", in which ideally consent of both minor and parent is obtained. This notion of "age of discernment" depends on the circumstances of each case, but often the age limit varies between 12 to 14 years. See also Commissie voor de Bescherming van De Persoonlijk Levenssfeer, *Aanbeveling nr. 02/2007 van 28 november 2007 inzake de verspreiding van beeldmateriaal*, *o.c.*, p. 8.

[13] For example the court of Brussels decided that a situation where two girls agreed to the application of make-up and then posed in dark surroundings for more than several seconds, implied consent to have their pictures taken. See Brussels 2 September 2003, *AR* 2000/1050, unpublished. Consent to publish the images can be implied if the portrayed person has been publishing the images all over the Internet himself. The lack of reaction of the portrayed person against the taking of pictures or publication thereof is also taken into account. See P. De Hert and R. Saelens, "Recht op afbeelding", *l.c.*, 874.

implicit consent for the recording of one's image.[14] However, it does not signify permission to use or further distribute this image in any context.[15]

Group photos are somewhat tricky. As long as the person concerned remains individually recognisable, his or her permission must in principle be sought before the photo can be used. However, consent is not necessary for a picture or footage which merely seeks to provide a general impression of an event, as long as the captured images are not used to single out the person in question.[16]

The right to personal portrayal is not absolute.[17] Over time, Belgian jurisprudence has come to recognise specific exceptions to the requirement of prior consent. Journalists, for example, are allowed to capture and use the images of persons when it is reasonably necessary to fulfil their role of public watchdog.[18] Moreover, public figures such as politicians, celebrities or athletes are deemed to consent implicitly to the recording and use of their image, provided the images in question relate to their public activity.[19]

In case of a dispute, it shall be up to the person who published (or otherwise used) the image to prove that the individual concerned has consented, be it implicitly or explicitly.[20] Failure to provide evidence of consent will be sufficient for the publication to be considered unlawful. Furthermore, it is not necessary for plaintiffs to establish fault or damages to obtain

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[14] P. De Hert and R. Saelens, "Recht op afbeelding", *l.c.*, p. 876.

[15] Id. For example, the permission to use one's image in the context of a magazine article does not imply permission for it to be used as part of a promotion campagne. See P. De Hert and R. Saelens, "Recht op afbeelding", *l.c.*, p. 876.

[16] P. De Hert and R. Saelens, "Recht op afbeelding", *l.c.* p. 877 L. Dierickx, "Recht op afbeelding", Antwerpen, Intersentia, 2005, 156. See also Antwerpen 26 maart 2007, NjW 2007, afl. 170, 801, noot BREWAEYS, E. See also Commissie voor de Bescherming van De Persoonlijk Levenssfeer, *Aanbeveling nr. 02/2007 van 28 november 2007 inzake de verspreiding van beeldmateriaal*, *o.c.*, p 10.

[17] See D. Voorhoof and P. Valcke, *Handboek Mediarecht*, *o.c.*, p. 240-250.

[18] See D. Voorhoof , "Facebook en de Raad voor de Journalistiek", *l.c.*, p. 40 et seq. See also *Schüssel v. Austria*, 21 February 2002. Decision (admissibility) regarding the complaint of the Deputy Prime Minister of Austria against the use of his picture on stickers, half-overlapped by the face of Jörg Haider (right-wing politician) and with the slogan "T*he social security slashers and the education snatchers share a common face*". The European Court of Human Rights repeated that "*the limits of acceptable criticism were wider with regard to a politician than with regard to a private individual*". Consequently, this publication was protected by Article 10 (freedom of expression). See also Journalistic Council ("Raad voor de Journalistiek"), Decision regarding the complaint of Mr. Paul de Vloo against the Newspaper "De Krant van West-Vlaanderen" and Pieter-Jan Breyne, journalist, ("Beslissing van de over de klacht van de heer Paul De Vloo tegen De Krant van West-Vlaanderen en Pieter-Jan Breyne, journalist"), 24 June 2010, accessible at http://rvdj.be/sites/default/files/pdf/beslissing201009.pdf

[19] For example in a case concerning a famous Belgian tennis player, the Court of Appeal of Ghent accepted implied consent for pictures of athletes illustrating their sport activities (e.g. during tournaments or important games). Nonetheless, this does not mean that the pictures can be commercially exploited for merchandising purposes without the explicit consent of the athletes. See Court of Appeal Ghent 21 februari 2008, 2005/AR/1734, not published; J. Deene, "Hof van beroep geeft Clijsters haar portretrecht terug", *Juristenkrant* 2008, afl. 171, 1.

[20] P. De Hert and R. Saelens, "Recht op afbeelding", *TPR* 2009, afl. 2, 873; Article 870 Belgian Judicial Code ('*actori incumbit probatio*').

relief.[21] The majority of jurisprudence agrees that a violation of the right to personal portrayal automatically implies moral damage. Material damage still needs to be proven, as well as the amount of the damage. [22]

b. Breach of confidence

Friends share secrets all the time. When they do, there often is an implicit understanding that what is shared in confidence will not be exposed to outsiders. Failure to respect such implied confidentiality can give rise to a significant privacy harms.

In the United Kingdom, there is an incidental remedy that allows a person to sue where confidential information has been disseminated online, i.e. the remedy for a breach of confidence. This common law notion has its origins in the protection of trade secrets but through case law developed as a means to deal with privacy claims.[23] It will protect a person that has revealed his secrets to someone under circumstances of confidence, against a breach of this person's trust. In order to have a claim, three requirements need to be fulfilled.

First of all, the information needs to have a quality of confidentiality. In other words, the information cannot be common knowledge or part of the public domain. Even so, not all inaccessible information will be considered confidential. No duty of confidence exists if the information is already in the public domain, if it is trivial[24] or when there is a public interest in the disclosure of the information.[25] A second requirement deals with the relationship or the situation in which the information was confessed and which has created an obligation to respect the confidence. Certain relationships are by nature confidential, like the relationship between a lawyer and his client or a doctor and his patient. In addition, courts have accepted

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[21] P. De Hert and R. Saelens, "Recht op afbeelding", *l.c.*, 872.Not everyone agrees that the violation of a personality right automatically constitutes a "fault" which may give rise to damages: see T. Van Sweevelt en B. Weyts, *Handboek Buitencontractueel Aansprakelijkheidsrecht*, Antwerpen, Intersentia, 2009, 1e editie,, p. 139-145. However, as the right to personal portrayal is also protected by article 10 of the Belgian Copyright Act, the fault can in any event be established by pointing to the violation of this legal provision. (T. Van Sweevelt en B. Weyts, *o.c.*, p. 144-145). See also VERJANS, E., "Buitencontractuele aansprakelijkheid voor schending van persoonlijkheidsrechten", *Rechtskundig Weekblad* 2013-14, afl. 14, p. 524 et seq..

[22] D. Voorhoof and P. Valcke, *Handboek Mediarecht*, *o.c.*, p. 240; Civil Court of Ghent 24 June 2002, *Niew juridisch Weekblad* 2002, nr. 12, 428; Civil Court of Brussels 19 May 2000, *Auteurs & Media* 2000, p. 338; *Court of Appeal of* Antwerp 24 June 1985, *Rechtskundig Weekblad* 1985-1986, 2646); P. De Hert and R. Saelens, "Recht op afbeelding", *l.c.*, 872.

[23] *Coco v A.N. Clark* [1969] RPC 41; *AG v. Guardian* (No. 2) [1990] 1 AC 109 (HL); T. Gibbons, "Recent Developments in Media Law in the United Kingdom", *AM* 2004, issue 3, p. 239; X., *Your rights – The Liberty Guide to Human Rights – Confidential information*, http://www.yourrights.org.uk/yourrights/privacy/confidential-information.html, last accessed 30 June 2014.

[24] For example information about the clothes someone wore for a wedding were considered as trivia, see *Michaelos* (2007) Ent LR 241, 244.

[25] T. Aplin, L. Bently, P. Johnson and S. Malynics, *Gurry on breach of confidence*, second edition, Oxford, University Press, 2012, 149.

that a duty of confidence can exist between spouses or even between two friends.[26] The final requirement for a breach of confidence is that there has to be a disclosure of the information without the authorisation and to the detriment of the confider.[27]

In Belgium, no general duty of confidence has been recognized to date.[28] However, certain breaches of confidence are actionable under article 449 of the Belgian Criminal Code, which punishes 'malicious publication' ('kwaadwillige ruchtbaarmaking'). Malicious publication can be described as the disclosure of a fact which robbed someone of his honour and which had been divulged for no reason of public or private importance and which only aimed at harming someone.[29] The existence of malice needs to be proven by the person claiming malicious publication. An alternative path to remedy in case of breach of confidence is liability in tort. According to article 1382, 'any act of a human being which causes damage to another, shall obligate the person whose caused the damage, to provide compensation.' This principle is complemented by article 1383 which states that 'everyone is liable not only for damage caused by his or her actions, but also for damage caused by his or her negligence or carelessness'. As these general principles are applicable to everyone, every OSN user will have to act as a reasonably careful and prudent person when uploading content online.[30] It has been accepted by case law that unnecessarily hurtful statements with no public interest or which ridicule or damage the reputation of a person can constitute a fault within the meaning article 1382 and 1383 of the Belgian Civil Code.[31] Unlike article 449 of the Criminal Code, articles 1382-1383 do not requiring a proof of malice. Once a fault is established, the injured party still needs to establish damages and a causal connection.

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[26] T. Aplin, L. Bently, P. Johnson and S. Malynics, *Gurry on breach of confidence*, second edition, Oxford, University Press, 2012, 406-407; *Tchenguiz v Imerman; Imerman v Imerman* [2010] EWCA Civ 908; J. Posnansky, *Hildebrand is dead. Long live Anton Piller,* August 2010, http://www.farrer.co.uk/Global/Briefings/08.%20Family%20Briefings/Hildebrand%20is%20dead.%20Long%20live%20Anton%20Piller.pdf.

[27] T. Aplin, L. Bently, P. Johnson and S. Malynics, *Gurry on breach of confidence*, second edition, Oxford, University Press, 2012, 664.

[28] Certain professionals like doctors, pharmacists, teachers and police officers do have a legal duty of confidence. See http://www.belgium.be/nl/justitie/privacy/beroepsgeheim/.

[29] J. Monballyu, *Six centuries of criminal law: history of criminal law in the southern Netherlands and Belgium*, Koninklijke Brill NV, Leiden, 2014, 351.

[30] The criterion to determine whether or not such a standard has been neglected is the comparison of the actions of the concerned person with the behaviour expected from a prudent and reasonable person in the same factual circumstances (so-called "bonus pater familias"). See B. Weyts and T. Vansweevelt, *Handboek Buitencontractueel Aansprakelijkheidsrecht*, Intersentia, 2009, 127. In case of a torts committed by a minor, the injured party can institute a claim against the minor's legal guardian(s) (e.g. parents) on the basis of article 1384 of the Civil Code. J. Feld, "Forums de discussion: espaces de libertés sous haute responsabilité", note under Bruxelles (9e ch.), 25 novembre 2009, *Révue du Droit des Technologies de l'Information (RTDI)* 2010, n° 38, p. 117.

[31] Court of Brussels (20th Chamber) 20 June 2011, *AM* 2012, Issue 5, p. 463.

c. Defamation and libel

OSN users who make false claims about others may be committing an act of defamation or libel. In Belgium, such statements are punishable under article 443 of the Belgian Criminal Code, which states that

> "*a person who maliciously charges someone of a certain fact, which may offend his honour or may expose him to public contempt, and which is not legally proven, is guilty of libel if the charge is not proven, or defamation when the law does not allow this proof*."[32]

Courts have recognised that articles 443 and 444 of the Criminal Code also apply online.[33] However, in order for a statement to be libellous or defamatory, certain requirements need to be fulfilled. The first requirement is the presence of *malicious intent*. The claimant must demonstrate that the alleged perpetrator had the specific intent to cause harm.[34] Secondly, there is a requirement of *publicity*.[35] In the case of public social networks like Twitter, it will be relatively easy to establish that this requirement has been fulfilled. After all, Twitter profiles are public by default.[36] In case of (semi)-private OSNs, such as Facebook or Netlog, access to profile content may be much more restricted.[37] In such cases, the publicity requirement will be assessed on a case-by-case basis.[38] For example, the Court of Brussels ruled that the publicity requirement was satisfied in a case involving email

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[32] P. Valcke & E. Lievens, *Media law in Belgium*, Alphen aan den Rijn, Kluwer Law International, 2011, pp 63-64. Many other jurisdictions, like France, Germany and the Netherlands also have provisions on defamation and libel in their criminal codes. (For the Netherlands see http://kellywarnerlaw.com/netherlands-defamation-laws/). Pursuant to article 444 of the Belgian Criminal Code, the allegations can be made either orally or in writing. Oral defamatory or libellous statements are referred to as "slander".

[33] Court of Appeal Brussels 19 March 2010, *AM* 3 (2010) (forthcoming).

[34] Rb. Brussel (4e k.) 25 juli 2001, J.L.M.B. 2001, afl. 36, 1575; It will not be sufficient to prove that the perpetrator knew that his allegations were false. Good faith requires that the suspect was convinced beyond doubt that the allegations were false and that he could not know that the reputation of the victim would be harmed. See I. Delbrouck, "Aanranding van de goede eer of de goede naam van personen", in X., *Postal Memorialis*. *Lexicon strafrecht, strafvordering en bijzondere wetten*, 1 June 2012, 24-25.

[35] To be considered "public", the statements must have been made (1) in public meetings or public places; (2) in the presence of several individuals in a place open to a certain number of persons; (3) in any place, in the presence of the offended person and in front of witnesses; (4) on written documents or images which have been distributed, sold, or exposed to the public; or (5) on written documents which have not been publicised but which have been addressed to several persons" (article 444 of the Belgian Criminal Code). See also C. J. Glasser, *International Libel and Privacy Handbook: A Global Reference for Journalists, Publishers, Webmasters and Lawyers,* New York, Bloomberg Press, Second edition, 2009, 234.

[36] G. Somers & L. Nauwelaerts, "Onrechtmatige handelingen op sociale netwerken: wie is nu eigenlijk aansprakelijk?" in P. Valcke, P.J. Valgaeren & E. Lievens (eds.), *Sociale media – Actuele juridische aspecten*, Antwerpen, Intersentia, 2013, 101. Even if a Twitter profile does not have any or a low number of followers it would be difficult to argue that the statements made through this profile should not be considered "public" in the sense of article 443. (Id.)

[37] OSNs such as Facebook or Netlog offer users the possibility to keep their profiles (partially) private, allowing only friends or connected users to view the information they share.

[38] G. Somers & L. Nauwelaerts, "Onrechtmatige handelingen op social netwerken: wie is nu eigenlijk aansprakelijk?", *l.c.*, 101.

messages sent to multiple people which were subsequently accessible via an Internet discussion forum.[39] Conversely, a message directed at only one person will not be considered public.[40]

In 2012, the Belgian Court of Cassation issued an important decision regarding online defamation and libel. In this decision, the Court qualified defamatory and libellous statements on websites or weblogs as press offences.[41] According to article 150 of the Belgian Constitution, press offences are brought before the Assize Court. In practice however, cases concerning defamatory and libellous statements are hardly ever brought to Assize Court, resulting into factual impunity under criminal law.[42] Nonetheless, such cases can still lead to a civil suit based on extra-contractual liability.[43]

d. Data protection

In principle, every OSN user may be subject to EU data protection law. After all, OSN users generally act as "controllers" in relation to content they share.[44] Where these data concern other identifiable individuals, their activities fall within the personal and material

[39] Brussel, 27 June 2000, *AM* 2001, 142 (noot D. VOORHOOF); E. Wauters, "Beledigingen op Facebook zijn privé", *Juristenkrant* 2013, afl. 269, 16; See also Council Chamber of Nijvel, 4 December 2013, Case n° 75/11 (involving an animal rights activist who had insinuated through an OSN that a certain company that sold puppies had broken the Belgian Animal Welfare Law of 14 August 1986. According to the activist, the company sold fake dog passports and illegally ended the lives of unsold puppies. However, the activist did not have any real evidence to back these statements. The Council Chamber considered that the distribution of such libelous statements on a Facebook discussion forum constituted a press offence).

[40] Brussel, 27 juni 2000, *Auteurs & Media* 2001, 142. In France, the Court of Cassation judged that an employee who had posted insulting messages about the company she worked for on her Facebook profile and which were only accessible to a limited amount of her friends, did not fulfil the requirement of publicity (Cour Cass. Civ. 1, 10 april 2013, nr. 344, accessible at http://www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/344_10_26000.html). Under Belgian law, the threshold for « publicity » is much lower than under French law. As a result, Belgian courts would most likely rule differently if presented with similar facts. (E. Wauters, "Beledigingen op Facebook zijn privé", *Juristenkrant* 2013, afl. 269, 16.)

[41] According to the Court of Appeal of Gent, it does not matter whether the libellous statements constitute a discussion between two individuals, a professional conflict or a journalistic contribution on a public interest story. See Court of Appeal Gent, 14 June 2011; Cass. 6 March 2012, Nr. P.11.1374.N and Cass. 6 maart 2012, Nr. P.11.0855.N, unpublished; D. Voorhoof, "Weblogs en websites zijn voortaan ook 'drukpers'", *De Juristenkrant* 2012/246, 4-5. The Court of Cassation in a later case expressed that only written statements on online fora can constitute a press offence, not voice recordings or videos. See Cass. (2e k.) AR P.13.1270.N, 29 oktober 2013 (F.B. / P.D., F.V., Centrum voor gelijkheid van kansen en racismebestrijding) and E. Brewaeys, "Persmisdrijf via internet", *Nieuw Juridisch Weekblad* 2014, afl. 302, 408.

[42] D. Voorhoof, "Weblogs en websites zijn voortaan ook 'drukpers'", De Juristenkrant 2012/246, 4-5

[43] For example, the Court of Brussels ruled that the use of "unnecessarily hurtful and insulting words" on a blog can give rise to liability in tort, even if there is no malicious intent. Court of Brussels (20th Chamber) 20 June 2011, *AM* 2012, Issue 5, p. 463.

[44] B. Van Alsenoy, J. Ballet and A. Kuczerawy, 'Social networks and web 2.0: are users also bound by data protection regulations?', *l.c.*, p. 70. See also B. Van Alsenoy, "Rights and obligations of actors in Social Networking Sites", 2013, p. 25-27, accessible at https://lirias.kuleuven.be/bitstream/123456789/453689/3/2014.12.02_SPION_D6.2_Rights_and_obligations_actors_SNS_REV2.pdf.

scope of Directive 95/46/EC and its national laws of implementation. The Article 29 Working Party argues, however, that many OSN users will be exempted from compliance pursuant to the "personal use exemption" (article 3(2)).[45] Nevertheless, national data protection law will still apply to:

(1) individuals with public profiles;
(2) individuals who use OSN not only for private purposes (e.g., professional or political purposes); and
(3) individuals whose profile is set to 'private' but is de facto accessible to an 'indefinite' number of people.[46]

Article 23 of Directive 95/46 provides that any person who has suffered damage as a result of an unlawful processing operation is entitled to receive compensation from the controller for the damage suffered. The controller may be exempted from this liability, in whole or in part, if he proves that he is not responsible for the event giving rise to the damage.[47]

Countless scenarios can be imagined in which processing activities performed by an OSN user would arguably constitute a violation of data protection principles. For example, what if an OSN user reveals that one of his "friends" suffers from a sexually transmitted disease, thereby violating the general prohibition on the processing of data related to health or sex life? Or shares information about a drunk driving conviction? Such forms of conduct will generally be actionable on the basis of other grounds than the provisions of a Member States' data protection act (e.g., defamation, malicious publication, breach of confidence; cf. *supra*). However, not all claims give rise to the same extent of damages and may be subject to different exceptions.[48] For instance, in many Member States, one of the lines of defense against defamation charges lies in proving the veracity of the stated facts. When there is no pre-existing relationship of confidence between the plaintiff and the defendant, a claim for misuse of private information under UK law requires that the defendant acquired the information by 'unlawful or surreptitious means'.[49] As result, an injured party may still wish

[45] Article 29 Data Protection Working Party, Opinion 5/2009 on online social networking', *l.c.*, p. 5.
[46] See e.g. P. Van Eecke and M. Truyens, 'Privacy and Social Networks', l.c., p. 540; N. Helberger and J. Van Hoboken, 'Little Brother Is Tagging You – Legal and Policy Implications of Amateur Data Controllers', *l.c.*, p. 101 et seq. and D.B. Garrie, M. Duffy-Lewis, R. Wong and R.L. Gillespie, 'Data Protection: the Challenges Facing Social Networking', *l.c.*, p. 147 et seq. Even before Opinion 5/2009, several authors considered it likely that a substantial number of OSN users might not be able to benefit from the personal use exemption. See e.g. R. Wong, 'Social Networking: Anybody is a Data Controller!', (last revised) 2008, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1271668 and B. Van Alsenoy, J. Ballet and A. Kuczerawy, 'Social networks and web 2.0: are users also bound by data protection regulations?', *l.c.*, p. 75.
[47] Article 23(2) of Directive 95/46/EC
[48] B. Van Alsenoy, J. Ballet and A. Kuczerawy, 'Social networks and web 2.0: are users also bound by data protection regulations?', *Identity in the Information Society* (IDIS) 2009, p.67, accessible at http://link.springer.com/article/10.1007%2Fs12394-009-0017-3.
[49] See K. Brimsted, "The JK Rowling photo case–are privacy rights evolving for the online era?", *Computer Law and Security Review* 2008, vol. 24, p. 466.

to invoke data protection requirements as a means to obtain redress. To be successful, the plaintiff will have to demonstrate that the defendant acted as a controller in relation to the processing at issue (e.g., the sharing of a picture, the posting of a comment) and that the processing occurred in violation of national data protection law. The defendant can then escape liability by demonstrating either that the processing was not unlawful or that the damages suffered could reasonably be attributed to him or her.

2.2 Contractual Liability

Providers of OSNs generally subject the use of their services to a number of terms and conditions. Acceptance of these "terms of use"[50] marks the beginning of a contractual relationship between the OSN provider and OSN user.[51] Failure to abide by the terms of use may therefore give rise to contractual liability.

OSN terms of use often specify, in both general and specific terms, that users must respect the rights of others when using the service. For example, Facebook's "Statement of rights and responsibilities" stipulates that

> "*You will not post content or take any action on Facebook that infringes or violates someone else's rights or otherwise violates the law. […]*
> *If you collect information from users, you will: obtain their consent […] and post a privacy policy explaining what information you collect and how you will use it.*
> *You will not post anyone's identification documents or sensitive financial information on Facebook.*
> *You will not tag users or send email invitations to non-users without their consent.*" [52]

The examples contained in Facebook's terms of use suggest that an OSN user who brings harm to the privacy interests others may be contractually liable vis-à-vis Facebook. Clause 16 goes on to specify that

> "*If anyone brings a claim against us related to your actions, content or information on Facebook, you will indemnify and hold us harmless from and against all damages, losses, and expenses of any kind (including reasonable legal fees and costs) related to such claim*."[53]

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[50] The terms of use of OSNs go by many names, e.g. "Statement of Rigths and Responsibilities" (Facebook), "Terms of Service" (Twitter), "User agreement" (LinkdIn) etc. See also G. Somers & L. Nauwelaerts, "Onrechtmatige handelingen op social netwerken: wie is nu eigenlijk aansprakelijk?", l.c., p. 95

[51] I. Samoy, P. Valcke, S. Janssen a.o., "Facebook maakt privéberichten openbaar: een casus contractuele aansprakelijkheid?", *Juristenkrant* 5 December 2012, p. 10.

[52] Facebook, "Statement of Rights and Responsibilities", 15 November 2013, accessible at https://www.facebook.com/legal/terms (last accessed 16 October 2014) (emphases added)

[53] Emphasis added.

This clause essentially obliges OSN users to indemnify Facebook for any expenses incurred, including legal fees, as a result of a violation of the terms of service. The validity of such clauses has been contested in certain jurisdictions.[54] Under Belgian law[55], the recoverability of legal fees is governed by article 1022 the Code of Civil Procedure.[56] This law limits the amount of damages which can be recuperated for legal expenses in disputes between private parties. In principle, no one may be asked to reimburse legal expenses above the maximum amounts established by Royal Decree (article 1022 *in fine* of the Belgian Code of Civil Procedure).[57] As for other damages, the OSN provider will need to demonstrate the existence of a direct causal relationship between the violation of the terms of use by the OSN user and the damages suffered by the OSN provider. Very often, the actual liability exposure of an OSN provider results not only from harmful or illegal content uploaded by its users, but

[54] For example, in 2004, a consumer organization successfully challenged a "hold harmless" provision included in the terms of use of internet service provider AOL France. The terms required AOL's customers to indemnify the service provider for all complaints and costs, including (yet without limitation of) reasonable legal fees. Under article 700 of the French Code of Civil procedure, however, it is for the deciding judge to determine the extent to which legal fees are to be reimbursed by the losing party. Moreover, article 32(3) of Law n° 91-650 of 9 July 1991 explicitly provides that recovery costs taken without an enforceable title must remain at the expense of the creditor. The French court considered AOL's clause too broad because it did not define what might constitute "reasonable costs", nor was there any means by which they could be readily determined. As a result, the French Court invalidated this provision and ordered for it to be removed from AOL's terms of use. See Tribunal de grande instance de Nanterre (1ère chambre), *UFC Que Choisir / AOL Bertelsmann Online France*, 2 June 2004, paragraph 13, accessible at http://www.legalis.net/spip.php?page=jurisprudence-decision&id_article=1211. See also E. Wauters, E. Lievens and P. Valcke, "Social Networking Sites' Terms of Use – Addressing Imbalances in the User-Provider Relationship through Ex Ante and Ex Post Mechanisms", JIPTEC 2014, No. 2, p. 141.

[55] According to Clause 16(1) Facebook's Statement of Rights and responsibilities, any disputes relating to the Statement of Rights and Responsibilities or Facebook shall be governed by Californian Law. However, article 6 of Regulation No 593/2008 (Rome I) provides that consumer contracts shall in principle be hall be governed by the law of the country where the consumer has his habitual residence. While parties may choose for a different law to be applicable under certain conditions, such a choice may not, however, have the result of depriving the consumer of the protection afforded to him by provisions that cannot be derogated from by agreement by virtue of the law which, in the absence of choice, would have been applicable (article 6(2) of Rome I). See also I. Samoy, P. Valcke, S. Janssen a.o., "Facebook maakt privéberichten openbaar: een casus contractuele aansprakelijkheid?", *Juristenkrant* 5 December 2012, p. 10 and E. Wauters, E. Lievens, P. Valcke and K. Lefever, "Over Tweeten, Friends & Followers: Juridische Kijk op Sociale Media", in P. Valcke en J. Dumortier (eds.), *ICT- en Mediarecht*, Brugge; Die Keure, 2012, p. 5-6.

[56] Article 1022 of the Code of Civil Procedure was modified in 2007 in order to provide for the recoverability of legal fees Wet van 21 april 2007 betreffende de verhaalbaarheid van de erelonen en de kosten verbonden aan de bijstand van een advocaat, B.S. 31 mei 2007). For more information regarding the recoverability of legal fees under Belgian law see M. Cybulski, "De verhaalbaarheid van de kosten van verdediging: en wat met de rechtshulp?", Master thesis, University of Antwerp, 2013, available at http://www.scriptiebank.be/sites/default/files/webform/scriptie/CybulskiMelissaDeverhaalbaarheidvandekostenvanverdedigingenwatmetderechtshulp20071474.pdf and L. Armiento, "De rechtsplegingsvergoeding en de toegang tot de arbeidsgerechten" Master thesis, University of Hasselt, 2013, available at https://doclib.uhasselt.be/dspace/bitstream/1942/15755/1/08273392012297.pdf (last accessed 20 October 2014).

[57] Koninklijk besluit van 26 oktober 2007 tot vaststelling van het tarief van de rechtsplegingsvergoeding bedoeld in artikel 1022 van het Gerechtelijk Wetboek en tot vaststelling van de datum van inwerkingtreding van de artikelen 1 tot 13 van de wet van 21 april 2007 betreffende de verhaalbaarheid van de erelonen en de kosten verbonden aan de bijstand van de advocaat.

from its own failure to act (cf. *infra*). A distinction therefore needs to be made between the action of the user and the non-action of the OSN provider. Any attempt to hold OSN users liable for the own fault of the OSN provider may be considered "unfair" and therefore invalid under Belgian consumer protection law.[58]

3. Liability of OSN providers

The issue of whether OSN providers may be held liable for user-generated content is a point of major controversy. On the one hand, there is a need for injured parties to be able to obtain an effective remedy. On the other hand, there is also a concern that rendering OSN providers liable for privacy violations could have an adverse impact, notably on freedom of expression.[59] Striking the appropriate balance among these - potentially conflicting - interests isn't always an easy task.

There are various reasons why the victim of a privacy harm may wish to address the OSN provider rather than OSN user from whom the content originated.[60] First, the actual originator may be difficult to identify or reside in a foreign jurisdiction. Second, the OSN provider can offer immediate relief: it can bring the privacy harm to a halt by removing or

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[58] The extent to which consumer protection legislation applies to so-called « free » online services is a topic of some debate. See E. Wauters, E. Lievens and P. Valcke, "Towards a better protection of social media users: a legal perspective on the terms of use of social networking sites", *International Journal of Law and Information Technology* 2014, p. 9-10 (arguing in favor of application of Consumer Rights Directive). According to the European Commission's Cloud Expert Working Group, the scope of the Unfair Contract Terms Directive 93/13/EEC is sufficiently broad to cover "free" services ("T*he Unfair Contract Terms Directive has a broad scope and applies to all consumer contracts for the supply of goods and services. Furthermore, its application is irrespective of whether the consumer paid a monetary price or not as a counter performance. Thus, contracts for the supply of 'free' cloud computing services are covered as well*") (European Commission's Expert Group on Cloud Computing Contracts, "Unfair Contract Terms in Cloud - Computing Service Contracts - Discussion Paper", p. 1, accessible at http://ec.europa.eu/justice/contract/files/expert_groups/unfair_contract_terms_en.pdf, last accessed 17 October 2014). For more analysis of the validity of Facebook's terms of use under Belgian consumer protection law see I. Samoy, P. Valcke, S. Janssen a.o., "Facebook maakt privéberichten openbaar: een casus contractuele aansprakelijkheid?", *Juristenkrant* 5 December 2012, p. 10-11.

[59] See e.g. M. de Azevedo Cunha, L. Marin and G. Sartor, "Peer-to-peer privacy violations and ISP Liability: data protection in the user-generated web", *International Data Privacy Law* 2012, Vol. 2, No. 2, p. 50 et seq. and G. Sartor, 'Providers' liabilities in the new EU Data Protection Regulation: A threat to Internet freedoms?', *International Data Privacy Law* 2013, Vol. 3, No. 1, p. 3 et seq.

[60] See also P. Valcke, M. Lenaerts, "Who's the author, editor and publisher in user-generated content? Applying traditional media concepts to UGC providers", *International Review of Law, Computers & Technology* 2010, Vol. 24, no. 1, p. 120 ; P. Van Eecke, "Online Service Providers and Liability: a Plea for a Balanced Approach", Common Market Law Review 2011, nr. 48, p. 1455; C. de Callataÿ, "Les responsabilités liées aux messages postés sur internet: l'extension du régime d'exonération de responsabilité des intermédiaires aux acteurs du web 2.0", *Auteurs & Media* 2013, p. 166 and B. Van Alsenoy, A. Kuczerawy and J. Ausloos, "Search engines after *Google Spain*: internet@liberty or privacy@peril?", *ICRI Working Paper Series*, no. 15, September 6, 2013, p. 5, accessible at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2321494 (last accessed 21 November 2014).

blocking access to the content at issue. While this does not prevent dissemination of the content through other fora, it may already offer considerable relief. A third reason why OSN providers make an attractive target for civil claims is because they often have deeper pockets than the originators of the harm.

As a rule, OSN providers are subject to the same rules of civil and criminal liability as everybody else. However, provided certain conditions are met, the provider of an OSN may benefit from a liability exemption. We will begin by discussing the legal grounds through which an OSN provider may be held liable for privacy harms originating from its users. Next we will discuss under which conditions the provider may be exempted from liability. Finally, a brief analysis shall be made of the contractual liability exposure of OSN providers.

3.1 Extra-contractual liability

In principle, website operators are subject to the general rules of civil liability contained in article 1382-1383 of the Civil Code.[61] As a result, an OSN provider may be held liable for any behaviour which (a) violates a legal provision (e.g., a provision of the Code of Economic Law) or (b) which may otherwise be considered as "wrongful" (i.e.., for failing to satisfy the general standard of care).[62]

With regard to the first category of behavior, it is important to note that certain legal provisions can be violated even if one isn't "knowingly" engaging in infringing behavior. For example, the dissemination of copyrighted material without permission of the rights holder may give rise to civil liability even if the person concerned was unaware that he or she was infringing upon the rights of others.[63] The mere fact of dissemination is in principle sufficient.[64]

With regard to the second category of behavior, everything hinges upon the applicable standard of care. In the absence of a violation of an explicit legal provision, a plaintiff must demonstrate that the defendant engaged in "unreasonable" behavior, either through its actions or non-action (negligence).[65] The liability exposure of an OSN provider therefore

[61] C. de Callataÿ, "Les responsabilités liées aux messages postés sur internet: l'extension du régime d'exonération de responsabilité des intermédiaires aux acteurs du web 2.0", *l.c.*, p. 170.

[62] Cf. supra; section 2. See also T. Van Sweevelt en B. Weyts, *o.c.*, p. 125 et seq. and J. Deenen, "Aansprakelijkheid van internet service providers", *Nieuw Juridisch Weekblad (NjW)* 2005, nr. 115, p. 724.

[63] J. Ausloos, N. Bertels and B. Coene, "Legal Requirements and Compliancy", *Games@School*, Deliverable D1.1, p. 86.

[64] J. Ausloos, N. Bertels and B. Coene, "Legal Requirements and Compliancy", *Games@School*, Deliverable D1.1, p. 87. As far as criminal liability is concerned, it is generally required that the culprit had a malicious or fraudulent intent when committing the act in question (the "moral element" of the crime). See C. Van Den Wyngaert, *Strafrecht, strafprocesrecht en internationaal strafrecht in hoofdlijnen*, Antwerpen, Maklu, 2006, p. 150 et seq. In practice this means that culprit must at least have been aware of the fact that he was contributing to the dissemination of unlawful materials. It is important to note, however, that such knowledge can be inferred. See e.g. Hof van Cassatie, 3 February 2004, A.R.P.03.1427.N (concerning the dissemination of child pornography via hyperlinks).

[65] See also T. Van Sweevelt en B. Weyts, *o.c.*, p. p127.

depends upon how one interprets the standard of care incumbent upon OSN providers more generally. This, in turn, will depend on the role imputed to the OSN provider.[66] In practice, much depends on whether or not the ONS provider is considered to act as a "publisher", a "controller", or a mere "technical facilitator" ("host").[67]

a. Publisher liability

A first approach through which an OSN provider might be held liable for harmful content is by labelling the OSN provider as an "editor" or "publisher".[68] To understand this approach, it is worth pausing to reflect briefly upon how the creation and dissemination of content over the internet has come to evolve.

In the early days of the internet, website operators generally made a conscious decision about which content to include on their website (or appointed someone to do so on their behalf). As such they assumed the role of a "publisher", comparable to the role played by publishers of newspapers or other print media.[69] Due to the intellectual activity of choosing which content should be included, each website operator (or its agent) passed a value judgment as to which content to include.[70] If they failed to exercise a reasonable standard of care when doing so, they could in principle be held liable.[71] The rise of social media - and web 2.0 in general - challenged this preconception. In this context, website operators are often not actively involved in vetting content, but merely facilitate the dissemination of content created by others. In this changing environment, the question than became: to what extent can a website operator still be held to standard of care similar to publishers? When might inclusion of harmful content be considered a "fault" justifying a civil claim for damages?[72] The answer to this question has varied both over time and across jurisdictions.

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[66] See also P. Valcke, M. Lenaerts, "Who's the author, editor and publisher in user-generated content? Applying traditional media concepts to UGC providers", *l.c.*, p. 121-124, who juxtapose the liability model for the publishers print media (cascade liability) with those for audiovisual media (objective liability).

[67] See also E. Montéro, "Les responsabilités liées au web 2.0", *Revue du Droit des Technologies de l'Information* 2008, n° 32, p. 366 et seq. ; C. de Callataÿ, "Les responsabilités liées aux messages postés sur internet: l'extension du régime d'exonération de responsabilité des intermédiaires aux acteurs du web 2.0", *l.c.*, p. 167.

[68] This tactic has often been employed in copyright litigation, with some success (see e.g. C. de Callataÿ, "Les responsabilités liées aux messages postés sur internet: l'extension du régime d'exonération de responsabilité des intermédiaires aux acteurs du web 2.0", *l.c.*, p. 168-169)

[69] This has been referred to as "Web 1.0". See P. Valcke, M. Lenaerts, "Who's the author, editor and publisher in user-generated content? Applying traditional media concepts to UGC providers", *l.c.*, p. 120 and E. Montéro, "Les responsabilités liées au web 2.0", *l.c.*, p. 364-365.

[70] P. Valcke, M. Lenaerts, "Who's the author, editor and publisher in user-generated content? Applying traditional media concepts to UGC providers", *l.c.*, p. 127.

[71] For example, one could argue that an editor or publisher should face liability when the inclusion of content constitutes "unreasonable" behavior, i.e. the content would not have been included by a normal and reasonable editor placed in the same circumstances (e.g., because it is clearly erroneous or unduly interferes with the rights of others).

[72] P. Valcke, M. Lenaerts, "Who's the author, editor and publisher in user-generated content? Applying traditional media concepts to UGC providers", *l.c.*, p. 120.

French courts, for example, have held that the operator of a website may in some circumstances be considered a "publisher" and thus liable for website content. In 2007, the TGI of Paris held that Myspace should be regarded as a "publisher" under press law and assume the corresponding duties.[73] Later, however, the same court considered video platform YouTube as a "hosting provider" rather than a "publisher".[74]

In the UK, certain website operators have also been qualified as "publishers" for purposes of defamation law. In 2013, for instance, the Court of Appeal ruled that Google could be considered as a "publisher" of (and thus liable for) defamatory content on its website blogger.com.[75] Specifically, it held that Google could be held liable as publisher once it had been notified of the defamatory nature of the content by means of a complaint.[76]

Under Belgian law, the situation is slightly more complicated due the special liability regime for so-called "press crimes" (cf. *infra*). Under this regime, publishers are in principle exempted from all liability for press crimes as long as the author is known and domiciled in Belgium.[77] However, publishers may still face civil liability in situations where a separate tort

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[73] Tribunal de grande instance de Paris, *Jean Yves L. dit Lafesse c. Myspace*, Ordonnance de référé 22 juin 2007, accessible at http://www.legalis.net/spip.php?page=breves-article&id_article=1965. See also T. Verbiest and G. Spindler a.o., "Study on the Liability of Internet Intermediaries", Study for the European Commission, Service Contract ETD/2006/IM/E2/69 12 November 2007 p. 103, accessible at http://ec.europa.eu/internal_market/e-commerce/docs/study/liability/final_report_en.pdf; P. Van Eecke and M. Truyens, "Liability of online intermediaries", in. X., *EU study on the Legal analysis of a Single Market for the Information Society – New rules for a new age?*, Chapter 6, DLA Piper, November 2009, p. 16, accessible at http://www.ec.europa.eu/information_society/newsroom/cf/document.cfm?doc_id=842 (last accessed 27 November 2014); P. Valcke, M. Lenaerts, "Who's the author, editor and publisher in user-generated content? Applying traditional media concepts to UGC providers", *l.c.*, p126. This decision was later reversed on other grounds (see Paris Court of Appeal, *Myspace/Jean Yves Lafesse et autres*, 29 October 2008, accessible at http://www.legalis.net/"?page=jurisprudence-decision&id_article=2471&quot)

[74] See e.g. TGI Paris, *Bayard Presse c. YouTube LLC*, 10 July 2009, available at www.legalis.net/jurisprudence-decision.php3?id_article=2693 (discussed by T. Verbiest and G. Spindler a.o., "Study on the Liability of Internet Intermediaries", *o.c.*, p. 103 and P. Van Eecke and M. Truyens, "Liability of online intermediaries", *l.c.*, p. 16). See also Court of Appeal of Paris, *Bloobox Net c. Olivier M.*, 21 November 2008, accessible at http://www.legalis.net/spip.php?page=jurisprudence-decision&id_article=2488. On the whole, it would appear that French jurisprudence has undergone a significant evolution in this respect. In the early decision, French Courts often treated website operators as "publishers", even in relation to user-generated content. More recent case law, however, seem more willing to extend the liability exemption for hosting providers to website operators as far as user-generated content is concerned. (M. de Azevedo Cunha, L. Marin and G. Sartor, "Peer-to-peer privacy violations and ISP Liability: data protection in the user-generated web", *l.c.*, p. 60-61). The liability regime for hosting providers will be discussed infra; section 3.2.b.

[75] Court of Appeal (Civil Division), *Payam Tamiz v. Google*, 14 February 2013, [2013] EWCA Civ 68, in particular at paragraphs 24 et seq., accessible at http://www.5rb.com/wp-content/uploads/2013/02/Tamiz-v-Google-CA.pdf (last accessed at 28 October 2014).

[76] *Ibid*, at 27. See also P. Valcke, M. Lenaerts, "Who's the author, editor and publisher in user-generated content? Applying traditional media concepts to UGC providers", in Paul Lambert (ed.). 2013, *Social Networking, Law, Rights and Policy*, Clarus Press, forthcoming; See also P. Van Eecke and M. Truyens, "Liability of online intermediaries", *l.c.*, p. 5, noting that the UK was the first European country to specifically adopt legislation to limit online intermediary liability prior to the introduction of the E-Commerce Directive. The UK Defamation Act was revised in 2013. For more information see D. Erdos, "Data Protection and the Right to Reputation: Filling the Gaps After the Defamation Act 2013", Cambridge Law Journal 2014, forthcoming (draft version accessible at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2283284).

[77] D. Voorhoof and P. Valcke, *Handboek Mediarecht*, *o.c.*, p. 252.

(other than the commission of a press crime) can be established.[78] Belgian case law varies as to the standard of care incumbent upon editors and publishers. As a general rule, neither editors nor publishers are under an obligation to verify the legality of the materials which they include for publication. As a result, the mere act of publication will in principle not be sufficient to give rise to liability.[79] However, if an editor or publisher becomes actively involved in the content itself (to the extent that he or she might be considered a "co-author") or otherwise appropriates it (e.g., by deciding to publish it in large fonts on the front page), he or she may still face civil liability.[80]

b. Data protection

In Belgium, liability for data protection violations is regulated by article 15bis of the Law of 8 December 1992 on the protection of privacy in relation to the processing of personal data.[81] This article specifies that the controller shall be liable for damages resulting from unlawful processing activities. This provision implies that, insofar as OSN providers may be considered to act as "controllers", they shall in principle be liable for harm suffered as a result of an unlawful processing operation.

The extent to which OSN providers may be considered to act as "controllers" in relation user-generated content was analyzed extensively in SPION D6.2.[82] While opinions vary, we concluded that OSN providers may be viewed as "controllers" in relation to their own processing activities, even if they concern operations upon data uploaded by users.[83] However, the liability of a controller is not a strict liability. Article 15bis goes on to specify that a controller may be exempted from this liability "*if he can prove that the injurious fact cannot be attributed to him*". The standard to assess whether or not an action or situation is

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[78] D. Voorhoof and P. Valcke, *Handboek Mediarecht*, *o.c.*, p. 254-255. This is because the special liability exemption of publishers only applies in relation to actual press crimes, not in relation to faults committed by a publisher which exist independently of the fault of the author (*Ibid*, p. 254). This distinction has been criticized as effectively undermining the protection intended by the Constitution: see C. de Callataÿ, "Les responsabilités liées aux messages postés sur internet: l'extension du régime d'exonération de responsabilité des intermédiaires aux acteurs du web 2.0", *l.c.*, p. 170-171 and P. Valcke, M. Lenaerts, "Who's the author, editor and publisher in user-generated content? Applying traditional media concepts to UGC providers", *l.c.*, p. 122-123.

[79] D. Voorhoof and P. Valcke, *Handboek Mediarecht*, *o.c.*, p. 255.

[80] D. Voorhoof and P. Valcke, *Handboek Mediarecht*, *o.c.*, p. 255-256.

[81] Wet van 8 december 1992 tot bescherming van de persoonlijke levensfeer ten opzichte van de verwerking van persoonsgegevens, B.S. 18 March 1993.

[82] B. Van Alsenoy, "Rights and obligations of actors involved in social networking sites", *SPION deliverable D6.2*, 2014, p. 22-24, accessible at https://lirias.kuleuven.be/bitstream/123456789/453689/1/SPION_D6.2_Rights_and_obligations_actors_SNS.pdf.

[83] However, there are also a number of scholars who have argued that OSN providers (or the providers of similar services) should not be considered as 'controllers' in relation to the content shared via their platforms. See e.g., P. Van Eecke and M. Truyens, 'Privacy and social networks', l.c., p. 539 and p. 543)

attributable to a controller is one of reasonableness.[84] As a result, a controller can escape liability if he demonstrates having continuously undertaken all reasonable measures to prevent the data protection violation from taking place, and to limit their effects once they have been manifested.[85] Many would argue that an OSN provider cannot reasonably be expected to preventively "screen" every profile or constantly monitor its application for any possible data protection violations initiated by users.[86] However, every OSN provider can reasonably be expected to put in place a mechanism to accommodate data subject rights in case of unlawful processing.[87] Failure to accommodate legitimate requests (e.g., a request for removal of information causing a disproportionate privacy harm) may therefore trigger liability of the OSN provider under data protection law.[88] As will be discussed under the following section, this outcome is essentially no different from the one arrived at by applying the general principles of tort law.

c. Negligence

A third basis for liability of OSN providers can be found in the general principles of tort law. In principle, every person may be held liable for damages resulting from failure to observe the general duty of care. The general duty of care may be violated either through an affirmative action or through non-action (negligence).[89] Failure to take reasonable measures to protect the interests of others also constitutes a "fault" which may give rise to civil liability.[90] So how should one apply the principles in the context of online social networks?

In relation to discussion fora, Belgian doctrine has made a distinction between two scenarios. In the first scenario, the website operator (or its agent) assumes the role of an active moderator, who screens content before it is published on the website. If this is case,

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[84] See B. Van Alsenoy, J. Ballet and A. Kuczerawy, 'Social networks and web 2.0: are users also bound by data protection regulations?', *l.c.*, p. 71.

[85] *Id.*

[86] *Id.* and M. de Azevedo Cunha, L. Marin and G. Sartor, "Peer-to-peer privacy violations and ISP Liability: data protection in the user-generated web", *l.c.*, p. 66 For similar argument in relation to search engines see B. Van Alsenoy, A. Kuczerawy and J. Ausloos, "Search engines after *Google Spain*: internet@liberty or privacy@peril?", *l.c.,* p. 29-30.

[87] See Article 29 Working Party, 'Opinion 5/2009 on online social networking', l.c., p. 11; College Bescherming Persoonsgegevens, 'Publicatie van Persoonsgegevens op het Internet', l.c., p. 42; Information Commissioner's Office (ICO), 'Social networking and online forums – when does the DPA apply?', l.c., p. 14; N. Helberger and J. Van Hoboken, 'Little Brother Is Tagging You – Legal and Policy Implications of Amateur Data Controllers', l.c., p. 104 et seq.

[88] In this regard, it is pointing again to the decision by the Italian Supreme Court in the Google Video case (Corte di Cassazione, sez. III Penale, sentenza 17 dicembre 2013 – deposit ail 3 febbraio 2014, sentenza n. 5107/14, in particular at paragraph 7.2, available at http://www.dirittoegiustizia.it/allegati/15/0000063913/Corte_di_Cassazione_sez_III_Penale_sentenza_n_5107_14_depositata_il_3_febbraio.html (last accessed 13 February 2014).

[89] See also T. Van Sweevelt en B. Weyts, *o.c.*, p. 127.

[90] R. De Corte., *Overzicht van het Burgerlijk Recht*, 2003, Mechelen, Kluwer, p. 558. In other words, the general duty of care entails that every person must take heed not only to protect his or her own interests, but must also take reasonable measures to protect the interest of others. (Id.)

liability may be triggered either by virtue of a judgment error or by virtue of negligence.[91] In the second scenario, the website operator (or its agent) does not assume the role of an active moderator, but only intervenes a posteriori (e.g., upon receiving a complaint). If this is the case, the website operator can in principle only be held liable for failure to limit the continuation of harm (by not removing the injurious content upon notice).[92]

Analogous considerations apply in the context of online social networks. After all, many OSN provider engage in moderation similar to that which occurs on discussion fora.[93] To the extent that the OSN does not intervene a priori in the posting of content, the provider shall remain exempt from liability until he is aware (or might reasonably be considered to be aware) of the existence of infringing content.[94] Once he is aware, however, the OSN provider may become liable for failure to limit the continuation of harm.[95] This outcome is essentially the same as the one which results from the special liability regime for the providers of "hosting services", which will be discussed in the next section.

3.2 Liability exemptions

a. Press crimes

In Belgium, liability for print publications is regulated in a very particular way. Article 25 of the Constitution provides that

> "*When the author is known and resident in Belgium, neither the editor/publisher, nor the printer, nor the distributor can be prosecuted*."

[91] J. Feld, "Forums de discussion: espaces de libertés sous haute responsabilité", *l.c.*, p. 118. While the actual fault may lie with the site moderator, the website operator may nevertheless be liable insofar as the moderator is acting as an agent on the operator's behalf (e.g., as an employee) (article 1384 Civil Code). To be clear, this approach can only be applied insofar as the imputed fault does not constitute a "press crime" (D. Voorhoof and P. Valcke, *Handboek Mediarecht*, *o.c.*, p. 252-253.) See also infra; section 3.2.a.

[92] J. Feld, "Forums de discussion: espaces de libertés sous haute responsabilité", *l.c.*, p. 118. See also B. Van Besien, "La responsabilité des gestionnaires de forums de discussion 'non commerciaux'", *Auteurs & Media* 2010, p. 566-567.

[93] Every OSN provider has its own terms and conditions which stipulate the rules of the platform, which include restrictions regarding the types of content which may be uploaded. The terms typically go on to specify that content which infringes terms and conditions may be removed by the OSN provider. While most removals occur in relation to complaints received by OSN users, some OSN providers also spontaneously take steps to detect violations.

[94] The assessment of actual or constructive needs to be made in every particular case. For example, for online social network which is designed to solicit discussion about sensitive topics between minors may warrant more proactive measures, as the risk of cyberbullying is more real.

[95] J. Feld, "Forums de discussion: espaces de libertés sous haute responsabilité", note under Bruxelles (9e ch.), 25 novembre 2009, *Révue du Droit des Technologies de l'Information (RTDI)* 2010, n° 38, p. 118. It is important to note in such a case the liability of the moderator is not a case of vicarious liability (liability for the action of others). Liability here results from the ability of the OSN provider to intervene, combined with his or her knowledge of the prejudicial nature of the content and the absence of intervention to stop the harm. (Id.)

This provision establishes a "cascade" system of liability for so-called "press crimes".[96] A press crime is a crime which combines the following four elements: (1) the expression of an opinion, which is (2) punishable by law and (3) which has been made public (4) by way of printed media.[97] The cascade system for liability works as follows: in principle, only the author of a press crime shall be held liable for its publication. Only when the author is unknown or does not reside in Belgium, may the other actors in the production chain be held liable, and in the following order: the editor or publisher, the printer and finally the bookstore or kiosk.[98]

The cascade system of liability for press crimes was created in order to protect the freedom of the press.[99] Specifically, it aims to shield to individual journalist from private censorship by either the editor or publisher.[100] By exempting the actors further down the production process from liability, it was hoped that they would be less likely to censor publications which might be considered dangerous or risky.[101]

Belgian courts have shown themselves willing to extend the special constitutional regime for press crimes to website operators.[102] Nevertheless, they are often still held liable in tort, even in cases where author is known.[103] There are mainly two reasons for this. First, Belgian Courts have come to construe the notion of a press crime quite narrowly.[104] For example, the mere conveyance of factual information which does not amount to the expression of an "opinion" is not considered a "press crime".[105] In this sense, pictures or images or not considered to convey an opinion and therefore the editor or publisher may be

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[96] P. Valcke, M. Lenaerts, "Who's the author, editor and publisher in user-generated content? Applying traditional media concepts to UGC providers", *l.c.*, p. 122.

[97] D. Voorhoof and P. Valcke, *Handboek Mediarecht*, *o.c.*, p. 105.

[98] P. Valcke, M. Lenaerts, "Who's the author, editor and publisher in user-generated content? Applying traditional media concepts to UGC providers", *l.c.*, p. 122.

[99] *Id.*

[100] *Id.*

[101] *Id.*

[102] C. de Callataÿ, "Les responsabilités liées aux messages postés sur internet: l'extension du régime d'exonération de responsabilité des intermédiaires aux acteurs du web 2.0", *l.c.*, p. 170-171; D. Voorhoof and P. Valcke, *Handboek Mediarecht*, *o.c.*, p. 105 ; P. Valcke, M. Lenaerts, "Who's the author, editor and publisher in user-generated content? Applying traditional media concepts to UGC providers", *l.c.*, p. 123. The Belgian Constitution also contains other protections to promote freedom of the press, namely the prohibition of censorship in the first indent of article 25 and the requirement that press crimes generally be tried before a citizen jury (article 150). For more information see also S. Mampaey and E. Werkers, "Drukpersmisdrijven in de digitale informatiemaatschappij: tijd om te bezinnen over de toekomst van art. 25 G.W.", Auteurs & Media 2010, vol. 2, p. 147 et seq..

[103] C. de Callataÿ, "Les responsabilités liées aux messages postés sur internet: l'extension du régime d'exonération de responsabilité des intermédiaires aux acteurs du web 2.0", *Auteurs & Media* 2013, p. 170-171.

[104] Mainly due to article 150 of the Constitution which requires that press crimes to be tried before a citizen jury See D. Voorhoof and P. Valcke, *Handboek Mediarecht*, *o.c.*, p. 104 et seq.

[105] P. Valcke, M. Lenaerts, "Who's the author, editor and publisher in user-generated content? Applying traditional media concepts to UGC providers", *l.c.*, p. 122.

held liable for its publication.[106] Second, as already mentioned earlier, the cascade regime does not apply in cases where the injured party succeeds in establishing a separate tort by the editor or publisher (cf. *supra*).[107]

b. Hosting services

A second liability exemption relevant to OSNs is the exemption for the providers of hosting services.[108] A hosting service is essentially any service which consists of the storage of information at the request of the recipient of the service.[109] A typical example of a hosting service is that of a "webhosting company", which provides web space to its customers who can then upload content to be published on a website.[110] However, the hosting exemption is defined in broad terms and may benefit any online service provider storing information at the request of its users.[111] For example, the CJEU has implicitly acknowledged that an OSN operator may qualify as the provider of a hosting service.[112]

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[106] D. Voorhoof and P. Valcke, *Handboek Mediarecht*, *o.c.*, p. 257. This implies, for example, that a website operator might be able to invoke the protection of article 25 of the Constitution in relation to a defamatory statement, but not in relation to pictures posted without the consent of the individual concerned.

[107] See also K. Lemmens, "Misbruiken van de meningsvrijheid via internet: is het recht Web 2.0-compatibel? Pleidooi voor een technologieneutrale bescherming van de uitingsvrijheid", *De orde van de dag*, March 2010, Issue 49, p. 20; P. Valcke, M. Lenaerts, "Who's the author, editor and publisher in user-generated content? Applying traditional media concepts to UGC providers", *l.c.*, p. 122 ; D. Voorhoof and P. Valcke, *Handboek Mediarecht*, *o.c.*, p. 254-255 and C. de Callataÿ, "Les responsabilités liées aux messages postés sur internet: l'extension du régime d'exonération de responsabilité des intermédiaires aux acteurs du web 2.0", l.*c.*, 170-171.

[108] The liability exemption for hosting services is one of three liability exemptions recognized by EU Directive 2000/31/EC.The rationale underlying these exemptions was the following: in the late 1990s, several European courts ruled that online intermediaries could be held liable for content uploaded by users. This jurisprudence troubled national legislators, who felt that it was inappropriate to apply traditional liability criteria to online intermediaries. Eventually, a European consensus emerged that online intermediaries should be protected against liability for content originating from third parties, as long as they were prepared to co-operate when asked to remove or block access to illegal or infringing content. (P. Van Eecke, "Online Service Providers and Liability: a Plea for a Balanced Approach", *l.c.*, p. 1455 et seq.) For more information see also T. Verbiest, G. Spindler et al., Study on liability of internet intermediaries, 12 November 2007, 115 accessible at http://ec.europa.eu/internal_market/e-commerce/docs/study/liability/final_report_en.pdf; E. Montéro, "Les responsabilités liées au web 2.0", *l.c.*, p. 364-365 and A. Kuczerawy, "Intermediary Liability & Freedom of expression: Recent developments in the EU Notice & Action Initiative", Computer Law and Security Review 2015, Vol 31, n° 1 (forthcoming).

[109] Such storage may be provided for a prolonged period of time, and may be either the primary or secondary object of the service. (Walden I, Cool Y., Montéro E., 'Directive 2000/31/EC –Directive on electronic commerce' in: Bullesbach A., Poullet Y., Prins C. (eds), Concise European IT Law, Kluwer Law International Alphen aan den Rijn, 2005, p. 243, 253.)

[110] P. Van Eecke, "Online Service Providers and Liability: a Plea for a Balanced Approach", *l.c.*, p. 1463.

[111] See also ECJ joined cases (Google France) C-236/08 to C-238/08 of 23 March 2010, para 111. See also P. Van Eecke, "Online Service Providers and Liability: a Plea for a Balanced Approach", *l.c.*, p. 1471-1473.

[112] ECJ, *Belgische Vereniging van Auteurs, Componisten en Uitgevers (SABAM) v Netlog NV,* Case C-360/10, 12 February 2012, para 27. See also TGI Paris, 13 Hervé G. c. Facebook, 13 April 2010, accessible at http://www.legalis.net/?page=breves-article&id_article=2898.

In order to benefit from the liability exemption for hosting services, there are three conditions that must be met, namely:

(1) absence of knowledge;
(2) absence of control; and
(3) expeditious action upon obtaining knowledge or awareness over the illegal activity or information.[113]

b.1 Absence of knowledge

The first condition to benefit from the hosting exemption is the absence of knowledge. In principle, a host shall be exempt from all liability as long as it does not have *actual* knowledge of the illegal activity or information. However, as regards civil liability, the service provider may nevertheless be held liable once it has "*become aware of facts or circumstances from which the illegal activity or information is apparent*".[114] This means that the provider of a hosting service may still face civil liability in case of "constructive" knowledge ("should have known"), even if actual knowledge in a particular case was lacking.

Once its attention has been drawn to a certain activity or content, the host must determine whether the activity or content is in fact illegal. Such a determination may be difficult to make.[115] As result, several scholars have argued that hosting providers should only risk liability in cases of "obviously" illegal or infringing information.[116] In *L'Oreal vs. eBay*, the Court of Justice of the European Union (CJEU) put forth the standard of "a diligent economic operator". Specifically, the CJEU held that a service provider may lose its liability exemption once it is "*aware of facts or circumstances on the basis of which a diligent economic*

[113] In Belgium, the liability exemption for hosting service providers is regulated by article XII.19 of the Code of Economic Law. The liability exemption for hosting services was previously regulated by the Law of 11 March 2003 concerning certain legal aspects of information society services (the "E-Commerce Law"), which implemented Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') (O.J., L-178, 17 July 2000 p. 1-16). Since then, the law of 15 December 2013 has integrated the E-Commerce Law into the Code of Economic law of 28 February 2013 (B.S., 29 March 2013).

[114] A. Kuczerawy, "Intermediary Liability & Freedom of expression: Recent developments in the EU Notice & Action Initiative", Computer Law and Security Review 2015, Vol 31, n° 1 (forthcoming)

[115] After all, most information is not illegal *per se*, so that its illegal nature depends on the circumstances in which it is used. Moreover, the legality of content varies across jurisdictions. What is considered "defamatory" in one jurisdiction isn't necessarily "defamatory" in another jurisdiction. Given the global nature of many internet services, hosting provider may sometimes struggle to determine whether or not content is unlawful (P. Van Eecke, "Online Service Providers and Liability: a Plea for a Balanced Approach", *l.c.*, p. 1465-1467)

[116] P. Van Eecke, "Online Service Providers and Liability: a Plea for a Balanced Approach", *l.c.*, p. 1467; C. de Callataÿ, "Les responsabilités liées aux messages postés sur internet: l'extension du régime d'exonération de responsabilité des intermédiaires aux acteurs du web 2.0", *l.c.*, p. 172-174 and G. Sartor, 'Providers' liabilities in the new EU Data Protection Regulation: A threat to Internet freedoms?', *International Data Privacy Law* 2013, Vol. 3, No. 1, p. 7. (arguing that liability should be excluded if a normal reasonable person might consider the content as being lawful).

operator should have identified the illegality".[117] This means that the provider of a hosting service can only be held liable if it is sufficiently clear that the content at issue infringes upon the rights of others.

b.2 Absence of control

The hosting exemption does not apply in cases where the information provider acted under the authority or control of the service provider.[118] For example, if the illegal content was introduced by an employee of the host, the liability exemption cannot be invoked. Certain case law suggests that service providers should also be "neutral'" or "passive" if they wish to avail themselves of the hosting exemption.[119] Since *L'Oréal v. eBay*[120], however, it is increasingly clear that neither neutrality nor passivity are actually requirements of the exemption.[121] For example, a hosting provider shall remain protected even when offering special tools to upload, categorize, display or search for content.[122] The offering of "recommendation engines" (e.g., a tool that provides users with text suggestions on the basis of submissions made by other users) also does not preclude application of the hosting exemption.[123] Only in cases where the involvement of the service provider is such that actual or constructive knowledge may be inferred shall the provider lose the benefit of the hosting exemption.[124]

b.3 Expeditious action

The hosting exemption only applies if the service provider "acts expeditiously" upon obtaining knowledge of the illegal information or activity. In practice, this condition has led many online service providers put in place some form of "notice-and-take-down" procedure

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[117] Court of Justice of the European Union, *L'Oréal v. eBay*, case C‑324/09, paragraph 120

[118] Article 14 (2) e-Commerce Directive.

[119] See C. de Callataÿ, "Les responsabilités liées aux messages postés sur internet: l'extension du régime d'exonération de responsabilité des intermédiaires aux acteurs du web 2.0", *l.c.*, p. 168 et seq. In *Google v. Louis Vuitton*, the CJEU stated that the neutrality requirement contained in recitals (42) and (44) of the e-Commerce Directive also applies for hosting services (CJEU cases C-236/08 to C-238/08 at paragraph 114) This approach was later criticised by the Advocate General (AG) in *L'Oréal v. eBay* , who argued that recital 42 only refers to the exemptions of mere conduit and caching. (AG Opinion C-324/09). See also P. Van Eecke, "Online Service Providers and Liability: a Plea for a Balanced Approach", *l.c.*, p. 1481-1483.

[120] Court of Justice of the European Union, *L'Oréal v. eBay*, case C‑324/09,

[121] C. de Callataÿ, "Les responsabilités liées aux messages postés sur internet: l'extension du régime d'exonération de responsabilité des intermédiaires aux acteurs du web 2.0", *l.c.*, p. 169-170.

[122] P. Van Eecke, "Online Service Providers and Liability: a Plea for a Balanced Approach", *l.c.*, p. 1483.

[123] *Id.*

[124] C. de Callataÿ, "Les responsabilités liées aux messages postés sur internet: l'extension du régime d'exonération de responsabilité des intermédiaires aux acteurs du web 2.0", *l.c.*, p. 170. See also Court of Justice of the European Union, *L'Oréal v. eBay*, case C‑324/09, paragraph 120. While the CJEU did not recant its earlier statement that hosting providers should be both "neutral" and "passive", it converted this statement to a requirement of absence of knowledge or control. P. Van Eecke, "Online Service Providers and Liability: a Plea for a Balanced Approach", *l.c.*, p. 1483.

(e.g., a "report abuse" or "social reporting" tool).[125] Such procedures allow injured parties to notify the hosting provider of the fact that their rights are being infringed and to request removal of the content at issue (or to at least disable access to it).

Not every notification gives rise to "knowledge" on the part of the hosting provider. The notification must be sufficiently clear and precise so that the service provider is able to (1) identify the content at issue and (2) determine its illegal or infringing character.[126] As indicated earlier, it must be sufficiently clear that the content at issue in fact infringes upon the rights of others.[127] It is also worth noting that a valid notification does not necessarily imply knowledge of future infringements of the same kind, even if they were committed by the same individual.[128]

Belgian law has stipulated one additional condition in relation to the hosting exemption. According to article XII.19, the service provider shall only remain exempted from liability if it notifies the District Attorney ("*Procureur des Konings*") as soon as it obtains actual knowledge of the illegal activity or behaviour.[129]

c. No general obligation to monitor

Hosting providers do not have a duty to actively go through stored information search of unlawful activities or content. In fact, article 15 of the e-Commerce Directive prohibits Member States from imposing a general monitoring obligation on hosting providers. In *Sabam v. Netlog*, the ECJ confirmed that an obligation for OSN providers to install a general filtering system for the detection of copyright infringements would violate the prohibition in the e-Commerce Directive.[130]

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[125] Strictly speaking, the e-Commerce Directive does not actually provide a 'notice-and-take down' mechanism. It merely implies it through its conditions for liability exemption.

[126] J. Feld, "Forums de discussion: espaces de libertés sous haute responsabilité", note under Bruxelles (9e ch.), 25 novembre 2009, *Révue du Droit des Technologies de l'Information (RTDI)* 2010, n° 38, p. 113; C. de Callataÿ, ""Les responsabilités liées aux messages postés sur internet: l'extension du régime d'exonération de responsabilité des intermédiaires aux acteurs du web 2.0", *l.c.*, p. 172; P. Van Eecke, "Online Service Providers and Liability: a Plea for a Balanced Approach", *l.c.*, p. 1485. See also Court of Justice of the European Union, *L'Oréal v. eBay*, case C‑324/09, paragraph 122.

[127] As mentioned earlier, the service provider will only lose its liability exemption once it is "*aware of facts or circumstances on the basis of which a diligent economic operator should have identified the illegality*". (Court of Justice of the European Union, *L'Oréal v. eBay*, case C‑324/09, paragraph 120). P. Van Eecke, "Online Service Providers and Liability: a Plea for a Balanced Approach", *l.c.*, p. 1465-1468 and 1472. See also J. Feld, "Forums de discussion: espaces de libertés sous haute responsabilité", *l.c.*, p. 113 (offering a few additional examples of difficult line to draw). See C. de Callataÿ, "Les responsabilités liées aux messages postés sur internet: l'extension du régime d'exonération de responsabilité des intermédiaires aux acteurs du web 2.0", *l.c.*, p. 170-172.

[128] See P. Van Eecke, "Online Service Providers and Liability: a Plea for a Balanced Approach", *l.c.*, p. 1478-1479.

[129] As long as the District Attorney has not taken a formal decision regarded the allegedly illegal content or activity, the hosting service provider may not delete the information – it may only disable access to it (see article XII.19, §3).

[130] CJEU, *Belgische Vereniging van Auteurs, Componisten en Uitgevers (SABAM) v Netlog NV,* Case C-360/10, 16 February 2012, para. 43. In this case, a Belgian court had to decide whether or not it could require Netlog (a

The prohibition towards monitoring obligations refers solely to monitoring obligations of a general nature. In other words, it does not concern monitoring obligations in a specific case, nor does it affect orders by national authorities in accordance with national legislation.[131] For example, an injunction to take down a specific file at a specific location does not constitute a general monitoring obligation.[132]

Article 14 of the E-Commerce Directive also does not affect the possibility for Member States of requiring service providers, who host information provided by recipients of their service, to apply duties of care, which can reasonably be expected from them and which are specified by national law, in order to detect and prevent certain types of illegal activities.[133] For example, an OSN provider might reasonably be expected to adopt appropriate restrictions in its terms of use or to establish a complaint or other notification mechanism to identify illegal content.[134]

3.3 Contractual Liability

OSN users and OSN providers have a contractual relationship.[135] If an OSN provider fails to live up to its end of the contract, it may become contractually liable.[136] Although the contract terms of OSNs are drafted to benefit the OSN provider as much as possible, there are ways in which OSN users can use them to their advantage.

Belgian OSN provider) to immediately cease making available works that belonged to SABAM's (a management company which represents authors, composers and publishers of musical works) repertoire.

[131] Recital (47). In other words, the E-Commerce Directive only prohibits general monitoring obligations, but does not restrict the ability for national authorities to impose 'specific' monitoring obligations. In practice it may however be difficult to distinguish between the two. (See E. Montéro, "Les responsabilités liées au web 2.0", *l.c.*, p. 384-386).

[132] For more a more detailed discussion of the difference between specific and general monitoring obligations see P. Van Eecke, "Online Service Providers and Liability: a Plea for a Balanced Approach", *l.c.*, p. 1486-1487. Last year, the Belgian Supreme Court held that an order which requires an Internet Access Provider to adopt "all possible technical means to block access" to content hosted on a particular server with specification of the technical means that should be used for this purpose, does not constitute a general monitoring obligation, because the Internet Access Provider has not been asked to monitor the information they transmit or store or to actively seek facts or circumstances indicating illegal activity. (Hof Van Cassatie, 22 October 2013, P.13.0550.N, accessible at http://jure.juridat.just.fgov.be/pdfapp/download_blob?idpdf=N-20131022-4, last accessed 25 November 2014)

[133] Recital (48). This prohibition towards general monitoring obligations in other words does not dispense information service providers of any obligations of due diligence which might be incumbent on them pursuant to national legislation (as long as such obligations do not amount to a general monitoring obligation) (E. Montéro, "Les responsabilités liées au web 2.0", *l.c.*, p., 382-383).

[134] Recital 48 e-Commerce Directive; B. Van Alsenoy, N. Vandezande, et al., Legal Provisions for deploying INDI services, GINI Deliverable D3.1, 2011.

[135] Cf. *supra*; section 2.2.

[136] Of course, the terms of use are only relevant in the relationship between OSN providers and OSN users, not between OSN providers and third parties who haven't become registered users of the platform. Their relationship will be governed by rules concerning extra-contractual liability.

Terms of use define how the OSN platform may or may not be used. An OSN user who suffers harm because of content shared by another OSN user, may try invoking these rules to obtain relief. Specifically, the OSN user could argue that the OSN provider is under a duty to enforce these rules as part of the contractual relationship that exists between them.[137] Alternatively, the OSN user could argue that taking appropriate action upon receiving a complaint is simply required by the general duty to execute contracts in good faith.[138]

OSN providers often attempt to limit their liability exposure through their terms of use. For example, Facebook's "Statement of rights and responsibilities" stipulates that

> "*We try to keep Facebook up, bug-free, and safe, but you use it at your own risk. We are providing Facebook as is without any express or implied warranties.*
> *[…]*
> *Our aggregate liability arising out of this statement or Facebook will not exceed the greater of one hundred dollars ($100) or the amount you have paid us in the past twelve months."*[139]

There are several reasons to question the validity of these terms. First, Belgian consumer protection law prohibits companies from excluding liability for intentional or gross misconduct as well as minor errors which constitute one of the main obligations of the contract.[140] In addition, Belgian consumer protection law also prohibits clauses which create a significant imbalance in the relationship between the provider and consumer of a service.[141] Facebook's liability cap of 100$ creates a significant imbalance between the liability exposure of Facebook and that of its users (which is in principle unlimited according to the same Statement of Rights and responsibilities).

[137] See also J. Feld, "Forums de discussion: espaces de libertés sous haute responsabilité", *l.c.*, p. 119.

[138] See J. Baeck, "Gevolgen tussen partijen", In: X., *Bijzondere overeenkomsten. Artikelsgewijze commentaar met overzicht van rechtspraak en rechtsleer*, IV. Commentaar verbintenissenrecht, Titel II, Hfdst. 6, Wolters Kluwer Belgium, Mechelen, 111p. ("aanvullende werking van de goede trouw").

[139] Article 16(3) of Facebook's "Statement of Rights and Responsibilities", 15 November 2013, accessible at https://www.facebook.com/legal/terms (last accessed 25 November 2014)

[140] Article VI.83, °13 of the Code of Economic law. See also I. Samoy, P. Valcke, S. Janssen a.o., "Facebook maakt privéberichten openbaar: een casus contractuele aansprakelijkheid?", l.c., p. 11.

[141] Ar. I.8, ° 20 juncto art. VI.84., § 1 of the Code of Economic Law.

4. Redress mechanisms

In practice, many privacy disputes will be resolved informally among the individuals concerned.[142] If they are unable to resolve their differences, however, the affected individual may wish to pursue other avenues for redress. The purpose of this section is to provide a summary overview of the different redress mechanisms available to individuals. It describes both ways to remove (or disable access to) harmful content, as well as ways to obtain compensation.

4.1 Informal notice facilitated by OSN

Some OSN providers offer tools which allow users to signal to one and other that they object to certain content. Facebook users, for instance, can use a link next to each picture or statement, to inform the uploader of the content that he/she does not approve of this content and kindly invite the uploader to take it down.[143] After clicking on the link, certain questions are asked such as "why don't you want to see this photo?" or "what's wrong with the photo?", so that the content uploader is informed of the reasons behind the informal report. It is then up to the uploader to decide whether or not he will take down the content. If the two parties are not able to resolve the problem, the individual whose rights have been breached will have to formally notify the OSN provider.

4.2 Formal notification

If an informal notice to the content uploader does not have a sufficient outcome for the victim, he or she could opt for a formal notice to the OSN provider.[144] The OSN user will then directly call upon the OSN provider to take down the unlawful content. What follows is an assessment of the complaint, to decide whether or not it is valid. If the OSN provider determines that the complaint is valid, he will have to take action in order to ensure that he remains exempt from liability (notice-and-take down).[145]

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[142] N. Helberger and J. Van Hoboken, 'Little Brother Is Tagging You – Legal and Policy Implications of Amateur Data Controllers', *Computer Law Review International (Cri)* 2010, Vol. 4, p. 108-109

[143] Facebook calls this "social reporting" and is convinced that most people will take content of the OSN platform if their friends ask them to. Furthermore, an OSN user can use the report flow to share the content with a parent, teacher or trusted friend, if he feels uncomfortable sending a message directly to the uploader. X., *What is social reporting*, last edited in April 2014, https://www.facebook.com/help/128548343894719/.

[144] The requirements for such a formal notice are not regulated as such, but they must be sufficiently precise and substantive. See Van Eecke, "Online Service Providers and Liability: A Plea for a Balanced Approach" *Common Market Law Review* 48, Issue 5, 2011, 1484-1485.

[145] Only recently a Facebook user who had become the victim of revenge porn sued Facebook and a former friend for 123 million dollars. The perpetrator had set up a fake page in the victims' name and added false naked body photographs with her face put on it. The victim had asked Facebook to remove the pictures but the OSN failed to act. The amount of damages comes from 10 cents in damages for each of the 1.23 billion

4.3 Complaint with Data Protection Authority

In cases where the injury is the result of a breach of the data protection act, the individual concerned can also file a complaint with its national Data Protection Authority (DPA). In principle, this is a non-judicial complaint procedure. The Belgian Data Protection Act authorizes the Privacy Commission initiate a mediation procedure (article 31), which can result in different outcomes. For example, the controller may recognize the individual's rights and reach some kind of settlement. If the mediation procedure does not lead to a settlement between the parties, the Privacy Commission can issue an opinion on the merits of the complaint of the data subject. The Privacy Commission also has the power to transmit the complaint to the Court of First Instance or, if the Commission discovers a criminal offence, it will have to inform the Public Prosecutor. As the decision of the Privacy Commission is not binding as such, there is no possibility to appeal.[146]

4.4 Civil suit

In certain cases, informal redress mechanisms and non-judicial complaint procedures will not result in the desired outcome. In such instances, a civil suit might be brought against either the OSN user or OSN provider. Civil suits will in principle be based on tort law, but may also derive from a violation of the criminal code. A civil suit may lead to compensation and/or injunctive relief.

a. Against the OSN user

a.1 Defamation or libel

In the case of defamatory or libellous statements, there are two ways to establish "fault" within the meaning of article 1382-1383 of the Beligian Civil Code. First, the fault can lie in the infringement of a statutory provision (like article 443 and 444 of the Belgian Criminal Code[147]). If the statement can be qualified as libel or defamation, there will be quasi-delictual or extra-contractual liability. This breach of the Belgian Criminal Code will then be the (proven) fault, as required by article 1382 of the Belgian Civil code. If unlawful or unnecessarily hurtful statements do not constitute an infringement of the Criminal Code, they

Facebook users. E. Mazza, *Facebook Sued For $123 Million Over 'Revenge Porn'*, 30 July 2014, http://www.huffingtonpost.com/2014/07/30/facebook-sued-over-revenge-porn_n_5632865.html.

[146] P. De Hert and M. De Pauw, *Ad Hoc Information Report Data protection: Redress mechanisms and their use*, 2012, retrieved from http://fra.europa.eu/sites/default/files/access_to_data_protection_remedies_country_be.pdf.

[147] A breach of article 443 and following of the Belgian Criminal Code does not mean that only the Assize Court will have jurisdiction.

can still fulfil the fault requirement.[148] In these situations, the court will rely on the criterion of the bonus pater familias instead of being limited by the specific requirements for libel and defamation as determined by the Criminal Code.[149] This means that the court will compare the actions of the concerned person with the behaviour expected from a prudent and reasonable person in the same factual circumstances.[150] In cases with an urgent character, an interim injunction before the President of the Court of First Instance is possible.[151]

a.2 Right of personal portrayal

The victim of a breach of portrait rights can file a civil claim based on two different legal grounds. First of all, a civil suit can follow out of a breach of Copyright law.[152] Furthermore, the portrayed person can launch a claim based on article 1382 of the Belgian Civil Code. The burden of proof rests with the uploader, who will have to prove that he had received prior consent. As mentioned before, evidence of any damage[153] is not necessary and the court will not have to use the criterion of reasonable care (bonus pater familias) in order to establish a breach of portrait rights. As regards the requirement of a causal connection, if the victim only claims moral damages, the courts will not pay much attention to it.[154]

a.3 Data protection

If an OSN user filed a request based on one of his data subject's rights[155] and the data controller did not respond within the prescribed time or ignored the request, the OSN user will be able to file a civil suit to invoke these rights.[156] The OSN user will have to provide

[148] As mentioned before, the civil Court of Brussels that the unnecessary use of hurtful and insulting words can constitute a tort, especially if there is no public interest. See Court of Brussels (20th Chamber) 20 June 2011, *AM* 2012, Issue 5, p. 463.

[149] B. Weyts and T. Vansweevelt, *Handboek Buitencontractueel Aansprakelijkheidsrecht*, Intersentia, 127.

[150] D. Voorhoof and P. Valcke, *Handboek Mediarecht*, *o.c.*,, 134-141; For example for journalists, the Court takes the following elements into account: has there been sufficient verification of the veracity of the statements and did the claimant had the opportunity to respond? See T. Devolder, *Journalistiek of laster en eerroof?,* 10 July 2013, (http://www.b-right.be/nl/journalistiek-of-laster-en-eerroof-300.htm). (Date of publication).

[151] The President can then take preventive measures. See article 548 of the Judicial Code.

[152] See article 86bis of the Belgian Copyright Act.

[153] Material damage is very difficult to prove. For instance, the loss of income due to a missed promotion because of an unprofessional image. With regard to moral damage, there is no unified opinion in jurisprudence or doctrine on whether or not there automatically is moral damage for breaching a personality right. (Yes: Gent 20 September 2006, *AM* 2007, 368; No: Court of First Instance of Brussels 17 May 2002, *AM* 2003, 138.) However the majority of the courts rules that a breach of portrait rights automatically constitutes moral damage. Consequently, the person whose rights have been breached does not have to proof the existence of moral damage. See L. Dierickx, "Recht op afbeelding", Antwerpen, Intersentia, 2005, 205.

[154] E. Verjans, "Buitencontractuele aansprakelijkheid voor schending van persoonlijkheidsrechten", *RW* 2013-2014, n°14, 532.

[155] The right to access, rectification, deletion, prohibition to use incorrect data. See Article 14 of the Belgian Privacy Act.

[156] The president of the court of first instance will have competence in these cases. See Article 14 of the Belgian Privacy Act together with article 587, 4° of the Judicial Code.

evidence of his identity, the violation of the Privacy Act and other elements depending on the specific violation.[157] In case of urgency, the OSN user can also opt for an interlocutory injunction (cf. infra). Furthermore, if the OSN user has suffered damage, he/she can exercise a right to compensation under article 15bis of the Belgian Data Protection Act against the uploader of the content.[158] The OSN user will then have to proof that the processing breached the Privacy Act, that he/she has suffered damage and that there is a causal connection between the breach and the damage.[159]

There are a number of possible outcomes relating to the different data subject's rights. The Court can prohibit a data controller to process the personal data or can order the data controller to make corrections to or even delete the personal data. Besides this, the Court can decide that the data subject deserves a financial compensation or can impose periodic penalty payments if the infringement is ongoing.

The claimant will have two levels of appeal on the decision of the Court of First Instance, namely review by the Court of Appeal and by the Court of Cassation.[160]

a.4 Interlocutory injunction

In case of urgency, OSN users can seek an interlocutory injunction before the president of the court of first instance, who can only take interim measures.[161] The basic requirement of urgency is fulfilled if the measures sought are strictly necessary and urgent, based on the specific circumstances of the case.[162] In other words, if the case would be deferred, the measures would no longer be useful or even possible. In cases of online defamation or violations of the right to personal portrayal, the urgent character would remain present if the online presence of the statements or pictures would further severely destabilise the situation, in particular because they continue to reach a broad audience.[163] If

[157] In case he claims rectification or erasure of incorrect data: the incorrectness of the data. In case he wants to obtain a prohibition to use the data: substantial and legitimate reasons for the prohibition.

[158] Act of 8 December 1992 on the protection of privacy in relation to the processing of personal data, unofficial translation available from http://www.privacycommission.be/sites/privacycommission/files/documents/Privacy_Act_1992.pdf. The uploader can only be exempted from this liability if he proves that the damaging act cannot be attributed to him.

[159] D. De Bot, "Verwerking van persoonsgegevens" in X., *Reeks Recht en Praktijk*, nr 30, Kluwer, Antwerpen, 2001, 243.

[160] P. De Hert and M. De Pauw, *Ad Hoc Information Report Data protection: Redress mechanisms and their use*, 2012, retrieved from http://fra.europa.eu/sites/default/files/access_to_data_protection_remedies_country_be.pdf.

[161] See Article 1025-1034 of the Belgian Judicial Code for the whole proceedings. The measures decided by the president are only interlocutory, there will be no decision on the merits of the case at this point. The court cannot take any measures that relate to future publications that might cause reputational harm. The court can only interfere as far as there is a clear and obvious infringement. The requirement of urgency must be met both at the time of the introduction of the case as well as at the time of the ruling. See Antwerpen (8e k.) 20 december 2006, *AM* 2008, afl. 2, 133.

[162] Article 584 of the Belgian Judicial Code.

[163] Antwerpen (8e k.) 20 december 2006, *AM* 2008, afl. 2, 133.

there is a clear and obvious infringement, the president can intervene and order to prevent the publication or delete the damaging content.[164] The president will have to determine whether there is a pressing social need, whether the interference is proportionate to the legitimate aim pursued and whether its justification is relevant and sufficient in respect of Article 10 ECHR.

Additionally, in relation to the right to personal portrayal, Article 86ter §1 of the Belgian Copyright law foresees in the possibility to seek a prohibitory injunction, both against the uploader of the content as against the OSN provider. The proceedings will be the same as for obtaining an interlocutory injunction.[165]

a.5 Compensation and/or injunctive remedy

There are several possible outcomes of a civil suit. The court can order the uploader to compensate the damage, for example by deleting the image or libellous statement from his Facebook profile, or by publishing the judgement on his profile.[166] Second, the court can require the uploader to delete the image, which can be accompanied by damages imposed on a daily basis in case of non-compliance.[167] Third, the court can order a person to refrain from spreading pictures or libellous statements or insults through public fora, like Facebook.[168] Such a prohibition is normally subject to payment of a penalty for each further infringement.[169] Finally, the court can grant the victim a compensation for any moral or material damage suffered.[170]

The amount of moral damage is very difficult to measure. Therefore, the court often grants a symbolic sum of 1 euro.[171] Recently, however, moral damage caused by defamatory or libellous statements is being estimated more effectively and economically, and "ex aequo et bono" (reasonableness). For instance, in a case concerning a Belgian commercial broadcaster who had aired a TV programme showing damaging footage of a person without obtaining this person's consent, the court took into account the audience measurement (702 000 viewers) and estimated the moral damages at 702 000 Belgian francs (17 402 EUR).[172] In most cases, however, victims suffering moral damage from a privacy infringement are only granted a symbolic compensation. Nonetheless, there is one example where the Court of Appeal of Brussels granted a compensation of 2000 EUR to a data subject for the

[164] For instance, if a breach of portrait rights has not yet occurred, there is a possibility to take preventive action through interim proceedings. Article 86ter §1 first indent of the Belgian Copyright Act.
[165] D. Voorhoof and P. Valcke, Handboek Mediarecht, 4th edition, Brussels, Larcier, 2014, 84.
[166] L. Dierickx, "Recht op afbeelding", Antwerpen, Intersentia, 2005, 272.
[167] L. Dierickx, "Recht op afbeelding", Antwerpen, Intersentia, 2005, 278.
[168] Art 87 of the Belgian Copyright law.
[169] D. Voorhoof and P. Valcke, Handboek Mediarecht, 4th edition, Brussels, Larcier, 2014, 265.
[170] See D. Voorhoof and P. Valcke, Handboek Mediarecht, 4th edition, Brussels, Larcier, 2014, 261-262.
[171] E.g., Court of First Instance of Brussels, 15 October 2009, *AM* 2010/2, Luik, 30 June 2010, *AM* 2010/5-6, 551, etc.).
[172] See Court of First Instance of Brussels (33th Ch.), 19 May 2000, *AM* 2000/3, 338.

unauthorised sharing of her health data by her insurance company.[173] Material damages are also estimated ex aequo et bono, but the courts have taken a more objective approach. For instance in a case concerning a Belgian tennis player whose image was being commercially exploited without her consent, the court estimated the damage to be 10% of the actual sale of a similar product produced with the consent of the tennis player.[174]

b. Against the OSN provider

The liability exemption for hosting is horizontal in nature, meaning that it applies to all kinds of harmful content, including content that infringes copyright law or defamatory or libellous statements. In order to be exempt from a claim for damages, the OSN provider cannot be aware of facts or circumstances from which the illegal activity or information is apparent. Therefore the exemption will cease to exist once the OSN provider has been notified of the defamatory or libellous statements and has not acted expeditiously after assessing whether the complaint was valid (notice-and-take down mechanism). In case the OSN provider cannot rely upon the hosting exemption of the e-Commerce Directive, the OSN user can file a civil claim (cf. *supra*). So for example if the OSN provider has not acted expeditiously to remove the harmful content, it could be liable for the damage caused to the concerned OSN user.

4.5 Pressing criminal charges

a. Libel and defamation

As previously mentioned, defamatory or libellous statements on social media by bloggers or micro bloggers constitute press offences. The Belgian Assize Court has exclusive jurisdiction, however in practice these cases are only dealt with in civil courts. In order to bring a case before the criminal court, the victim will have to file a complaint at the police office. There are no special formalities that need to be taken into account, it is sufficient that the will to condemn the harmful facts is showing.[175]

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[173] See Court of Appeal of Brussels, 13 May 2002, RGAR 2005, nr. 14047 as cited by Y.S. van der Sype, W. Vandenbussche, I. Samyn, N. Portugaels, "Allen tegen één: Over de rechtsvordering tot collectief herstel en de bescherming van persoonsgegevens op het internet.", *Computerrecht* 2014/180, afl. 6, December 2014, 323.

[174] See Court of Appeal of Ghent, 21 February 2008, *AM* 2008/4, 318 as cited by D. Voorhoof and P. Valcke, Handboek Mediarecht, 4th edition, Brussels, Larcier, 2014, 262-263.

[175] European e-Justice Portal, *Mijn rechten tijdens het onderzoek*, 7 June 2014, https://e-justice.europa.eu/content_rights_of_victims_of_crime_in_criminal_proceedings-171-BE-nl.do?clang=nl&idSubpage=1&member=1. (Consultation date).

In the exceptional situation that a libel or defamation case is brought before the criminal court, the burden of proof of the veracity of the allegations will rest with the OSN user who posted the statement. Nonetheless, the claimant will have to proof the intentional element. In other words, the claimant has to proof that the uploader had the special intention to cause damage. Such evidence is often difficult to provide.[176]

b. Malicious publication

As with libel and defamation, In order to bring a case before a criminal court, the victim will first have to file a complaint at the police office. There are no special formalities that need to be taken into account, it is sufficient that the will to condemn the harmful facts is showing. The complainant has the choice between filing a claim with the public prosecutor based on article 443 of the Criminal Code or join a civil claim. This can be done either in person or via an attorney. During the procedure, the complainant can exercise certain rights, such as the right to access to the file, to request additional investigatory measures and to be informed. In a civil claim, the complainant does not have to prove the existence of the crime, nor the guilt of the OSN user that has made the defamatory or libellous statements.[177]

[176] B. Van Besien, *When are journalists liable for defamation and breach of privacy under Belgian law?*, 4 March 2014, http://siriuslegaladvocaten.be/wordpress/when-are-journalists-liable-for-defamation-and-breach-of-privacy-under-belgian-law/?lang=en. (Date of publication).

[177] European e-Justice Portal, *Mijn rechten tijdens het onderzoek*, 7 June 2014, https://e-justice.europa.eu/content_rights_of_victims_of_crime_in_criminal_proceedings-171-BE-nl.do?clang=nl&idSubpage=1&member=1. (Consultation date).

5. Conclusion

When sharing online content, OSN users need to take into account the privacy interests of others. The privacy interests of individuals are protected by a range of legal constructs. Firstly, all individuals have the right to personal portrayal. This entails that anyone seeking to record or use the image of another person must first obtain that person's consent. Consequently, taking a picture of someone and posting it online without their consent would constitute a clear infringement of this right. Secondly, individuals have a legitimate expectation that confidential information will not be public. When confidence is breached, there can be liability in tort. Every OSN user has a duty to act as a reasonably careful and prudent person when sharing information online. Besides this, OSN users that post false statements about other users on the OSN, can be held liable. Finally, some OSN users may also be subject to EU data protection law. If the user does not benefit from the personal use exemption, he or she might be held liable for an unlawful processing of personal data under national data protection law.

OSN providers are subject to the same rules of civil and criminal liability as everybody else. However, unless they play an active role in the solicitation or further dissemination of content, they will typically only risk liability once they become aware of the illegal content or activity.

Individuals who suffer harm because of content shared on OSNs have several means to obtain redress. Very often, privacy disputes will be resolved informally among the individuals concerned and without recourse to formal legal mechanisms. If they are unable to resolve their issues informally, the OSN provider might be willing to offer assistance. If this also fails, the injured party can either bring a complaint before the Belgian Data Protection Authority seek judicial redress for privacy harms. These include both remedies to remove (or disable access to) harmful content, as well as ways to obtain compensation.